U.S. Department of Labor

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Issue Date: 22 July 2005

Case No. 2004 LHC 02730

OWCP No. 5-112185

In the Matter of

RONALD WILSON, JR.,
Claimant
v.

VIRGINIA INTERNATIONAL TERMINALS,
Employer

Appearances:
Matthew H. Kraft, Esq., for Claimant
R. John Barrett, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, Ronald Wilson Jr., covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he suffered a work-related injury to his back and right hip on August 3, 2001, while employed by Employer, Virginia International Terminals, and that he is currently temporarily and totally disabled.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on March 3, 2005. (TR at 1).[1] Claimant submitted twelve exhibits, identified as CX 1- CX 12, which were admitted without objection. (TR. at 8). Employer submitted sixteen exhibits, EX 1 through EX 16. Employer withdrew EX 10 upon agreement of the parties. Claimant's objection to EX 9 was sustained, and thus EX 9 was excluded from consideration. (TR. at 11). The parties agreed to hold the record open post-hearing for the submission of a deposition of Dr. Jiranek, which was later admitted into the record as EX 16. (TR. at 12). At the conclusion of the hearing, the record was held

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

open sixty days for the submission of post-hearing briefs. Employer submitted its brief on May 3, 2005. After requesting a two week extension in which to file his brief, Claimant submitted his brief on May 25, 2005.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant is entitled to temporary total disability benefits for the period of July 10, 2002 through August 14, 2002;

2. Whether Claimant is entitled to temporary partial disability benefits for the period of January 28, 2003 through April 9, 2003;

3. Whether Claimant is entitled to temporary total disability benefits for the period of April 10, 2003 through the present and continuing.

STIPULATIONS

At the hearing, Claimant and Employer stipulated:

1. That on August 3, 2001, Ronald Wilson, Jr. suffered a compensable injury in the course and scope of his employment with Virginia International Terminals;

2. That the parties are subject to the Longshore & Harbor Workers' Compensation Act;

3. That claimant's average weekly wage at the time of injury was $240.21 resulting in a compensation rate of $233.46;

4. That claimant was paid various periods of indemnity as listed in employer's form LS-208 (EX 11);

5. That claimant was provided with medical treatment under Section 7 of the Act;

6. That a timely notice of claim and injury was submitted by claimant and a timely notice of Controversion filed by employer.

7. That claimant is unable to return to his former Longshore employment.[2]

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant is a twenty-five year old male who was formerly employed as a freight handler for Employer. (TR. at 13). During his employment with Employer, Claimant rode a forklift and was responsible for taking the freight off the ship. (TR. at 14). At the hearing Employer stipulated that Claimant cannot return to this employment. (TR. at 14).

Claimant testified that prior to his employment with Employer, he worked at McDonald's for approximately four years. (TR. at 14). Claimant explained that he worked as a cook, and that this position required standing. (TR. at 15). Before coming under the employ of Employer, Claimant also worked at a used car auto store, stocking parts. Claimant noted that this was also a standing position. (TR. at 15). Claimant had also previously worked as a lawn care technician for Ebony Lawn Care. (TR. at 16). Claimant further testified that he completed two years of college, studying business education. (TR. at 13).

Claimant testified, and the parties stipulate, that he injured his back and right hip while working for Employer on August 3, 2001. (TR. at 16; JX 1). Claimant noted that he came under the medical care of Dr. Lannik following his injury. (TR. at 17). Claimant testified that there were various periods of time in which he received benefits from Employer as a result of his injury. (TR. at 17). Claimant stated that he was eventually released for light duty work. (TR. at 17).

Claimant testified that following his release, he went to a company called Outsource Resources Incorporated to do "sitting-type work." (TR. at 17). Claimant noted that during this time, Employer paid partial disability benefits based on wage loss. (TR. at 17). Claimant described the events that led to his termination from Outsource Resources:

> I went to the job and as soon as I entered the building I was told [by an Outsource Recourses supervisor] that the employer there was told by Mr. Lynn that he had stated that, Don't come back. Just don't – don't even – you know I got returned home that day. He said, 'Don't come back to work.'

(TR. at 18).

Claimant testified that he had surgery performed by Dr. Jiranek on his hip in October of 2002. (TR. at 19). Since that time, Dr. Jiranek has been Claimant's primary treating physician for his work-related injuries. (TR. at 19). Claimant was placed on a no-work status immediately following this surgery, but was later returned to light duty. (TR. at 20).

[2] Tr. at 14.

After his release, Claimant obtained a position through vocational rehabilitation at a company called Randstad. (TR. at 20). Claimant noted that he engaged in sedentary work in this position, which included "measuring ads in the paper." (TR. at 21). Claimant held this position for approximately three to four months. (TR. at 21). Claimant testified that he suffered hip pain during this time. Claimant explained that he was required to sit for long periods of time, and was also required to engage in some standing and walking. (TR. at 22).

Claimant testified that on February 4, 2003, he was coming out of the Randstad building for lunch when he felt very fatigued and passed out. (TR. at 22). Claimant noted that he hit his knee quite hard when he fell, and an ambulance was called to assist him. (TR. at 22). Claimant was taken via ambulance to Chesapeake General Hospital. (TR at 23). Claimant again returned to the hospital on February 14, 2003, after he fell on his right hip. (TR. at 24). Claimant noted that he returned to work at Randstad following these incidences. (TR. at 24).

Claimant's employment with Randstad ended on April 9, 2003. (TR. at 24). Claimant explained:

> I had a meeting with my supervisor and she told me that I was slowing down production. And that's all that was said. So what happened I'm not sure. She just said she had to let me go.

(TR. at 25). Claimant testified that they both agreed that he had been having problems with production. Claimant explained that he had to take many breaks throughout the work day, as recommended by his doctor, to ease the pain in his legs. (TR. at 25). Claimant testified on cross that Randstad had offered him another job within their company. (TR. at 38 – 40). Claimant explained that the additional offer he received from Randstad was for a toll position, which required much standing, and therefore would not comply with his work restrictions. (TR. at 57). Claimant testified that he pursued employment with Randstad three months after he left, though this is not listed in his job search log. (TR. at 41).

Claimant testified that he found other employment after he left Randstad. (TR. at 26). Claimant worked at Car Care Creations from December 11, 2003 until January 22, 2004. Claimant testified that he worked approximately eight hours a week, and was paid $2 an hour. (TR. at 26). Claimant testified that this was a temporary position, and his employment with Car Care Creations ended once the temporary need for it expired. (TR. at 56).

Claimant testified that though he has been looking, he has not been able to secure any other employment following January 22, 2004, the last day he worked for Car Care Creations. (TR. at 27). Claimant prepared a job search list to document his search, and testified that he was mainly seeking sedentary work. (TR. at 28; CX 2). Claimant noted that he applied for jobs listed on the labor market survey. (TR. at 29). Specifically, Claimant testified that he applied at Geico Direct, Household Credit, Bank of America, GC Services, AAA of Tidewater, Lillian Vernon, and ITC Group, but was not hired. (TR. 31-4). Claimant also sought a secretary position with various doctors', dentists' and attorneys' offices in his area, though none of these businesses had advertised open positions. (TR. at 34, 44.) Claimant testified that he felt qualified for these positions because he gained experience in administrative employment through

his positions at Car Care Creations and Outsource Resources. (TR. at 35). Claimant testified that he sought these positions in 2003 and in 2004. (TR. at 36). However, Claimant failed to seek any employment during July 1, 2004 until October 4, 2004. (TR. at 53). Claimant explained that his father had been in an accident, and that he had to deal with family matters during this period of time. (TR. at 55).

Claimant agreed on cross that he specified on certain job applications that he could not work weekends. (TR. at 46). On others, he neglected to list that he had completed two years of college. (TR. at 48). However, Claimant testified that he did list his college education on the majority of his job applications. (TR. at 59). Claimant testified that he didn't return to his employment with McDonalds, because he felt it was incompatible with his work restrictions. (TR. at 54).

Claimant testified that he had undergone two functional capacity evaluations since his injury, and that he had given his best effort during each test. (TR. at 38). Claimant noted that his level of pain associated with his work-related injury has stayed the same since April of 2003. (TR. at 38). Claimant appeared at the hearing using crutches. (TR. at 51). However, Claimant agreed on cross that Dr. Jiranek's notes dated May 23, 2003 stated that Claimant did not need crutches. (TR. at 52). Claimant testified that he recently underwent an IME with Dr. Campbell, who indicated to Claimant that he could use something to assist his walking. (TR. at 61). Claimant testified that he continues to have pain in his hip. (TR. at 61).

Testimony of Melissa Echevarria

Ms. Echevarria is employed as a vocational case manager for Genex Services. (TR. at 68). In this position, Ms. Echevarria works with both long-term disability clients and workers' compensation clients, and assists them in finding alternative employment. (TR. at 68).

Ms. Echevarria testified that she began working in the regional area in 1999, beginning with Career Options as a Rehabilitation Assistance Specialist. (TR. at 81). In this position, Ms. Echevarria worked as a vocational case manager, monitoring veterans as they pursued training and schooling. (TR. at 82). Ms. Echevarria testified that she became certified as a rehabilitation counselor, CRC[3], in 2002. (TR. at 83). Ms. Echevarria note that she has been CRP[4] certified since 2003. (TR. at 83). Prior to 2003, Ms. Echevarria was only able to do placement services and labor market surveys under supervision. (TR. at 83). Ms. Echevarria is not certified for vocational services through the United States Department of Labor, Office of Workers' Compensation Programs. (TR. at 84).

Ms. Echevarria testified that prior to her involvement in this case, Claimant was offered a position from Randstad dated January 28, 2003, for forty hours a week at $6.05 an hour. (TR. at

[3] Ms. Echevarria explained that she had to take a national test to obtain this certification. (TR. at 83).

[4] Ms. Echevarria noted that this certification is specific to the Commonwealth of Virginia. (TR. at 83).

70). This position was evidenced by a form completed by Mr. Claude Arehart.[5] (TR. at 84). Ms. Echevarria conceded that the number of hours Claimant actually worked in this position could have differed from the form. (TR. at 84).

Ms. Echevarria was subsequently requested in June of 2003 to draft a labor market survey based upon the restrictions and qualifications of Claimant. Ms Echevarria testified that she understood Claimant's restrictions to be "[s]edentary employment with the specification of walking or standing less than a half hour in an 8-hour time period." (TR. at 70, 73). Ms. Echevarria also considered Claimant's educational level as reported in the initial assessment between Claimant and Mr. Arehart. However, in drafting this labor market survey, Ms. Echevarria testified that she never met with nor completed testing on Claimant. (TR. at 84). Ms. Echevarria further conceded that as far as she understood, no vocational testing was ever completed on Claimant. (TR. at 84).

Ms. Echevarria described the labor market survey[6] (EX 8-1):

> This is my report that I put together of the assessments based on the claimant's restrictions and his residual capacities, which would be considered a transitional skills analysis, and various positions in the area that after speaking with employers I felt he could become employed in.

(TR. at 71). In drafting the report, Ms. Echevarria noted that she consulted the Dictionary of Occupational Titles to review job duties and responsibilities. Ms. Echevarria also referenced the Guide for Occupational Exploration to "compare and contrast what the residual capacities are from previous employment." (TR. at 71). Finally, Ms. Echevarria utilized the Occupational Outlook handbook to determine if the positions "will still be staffed in the next coming years, what the projection is for each job." (TR. at 71). Ms. Echevarria compared this information with that provided by the Virginia Employment Commission. (TR. at 71).

Ms. Echevarria testified to the process she followed in identifying jobs appropriate for Claimant:

> Since we were looking for sedentary employment I spoke with employers that I had previously worked with that had sedentary employment available and called them directly to verify if the sedentary positions were still available; if they would allow for standing of less than half-an-hour per day.[7]

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[5] Mr. Arehart was the vocational case manager who had previously handled Claimant's case on behalf of Genex Services. (TR. at 69).

[6] In her labor market surveys, Ms. Echevarria referenced the Velma System. Ms. Echevarria explained that this system is through the State of Virginia's Department of Labor, and provides a breakdown of job prospectus. Ms. Echevarria elaborated, "So if there would be an increase in positions it's listed there. They're projections for how the labor marked is turning." (TR. at 85).

[7] Ms Echevarria elaborated on cross, "I asked [the potential employer] if they were able to hire somebody who needed accommodations of sedentary employment with only up to a half an hour of standing per an 8-hour shift [. . .] [and] lifting requirements, 25 pounds or less." (TR at 86). Ms Echevarria conceded that she merely asked

> And, also, with sedentary, I always request if the person could sit or stand as needed because sometimes, even though it's sedentary, there's always that question of what if the person has to stand up or what if the person, you know, needed a break. And I verified, via a phone call, that questions about the restrictions a second time.
>
> The way I determine whom I am going to speak with is if I've worked with them in the past and I've identified who I should speak with, and basically, if they have openings or had openings in the past that I've staffed someone there.

(TR. at 72-3). The initial labor market survey for Claimant was completed in June of 2003. Ms. Echevarria noted that Dr. Jiranek approved of all the listed positions as being within Claimant's physical restrictions. (TR. at 92).

Ms. Echevarria testified that she updated the labor market survey in December of 2004. (TR. at 73). Ms. Echevarria explained that she contacted the eight potential employers a second time and "asked them the same questions about the restrictions and asked them if they were currently hiring or have hired – I usually ask about the last two or three months." (TR. at 75; 85). Ms. Echevarria learned through this process that one of the previously listed employers, GC Services, had closed. (TR. at 75).

Ms. Echevarria explained that most of the listed paid over minimum wage because she "didn't really find any minimum-wage positions that would accommodate sedentary employment." (TR. at 75). Ms. Echevarria opined that Claimant is able to compete for these higher paying jobs "[b]ased on the two years of education – post high school education and transferable skills[8]." (TR. at 87).

Ms. Echevarria testified that she was familiar with the job market in Elizabeth City, as well as in the Tidewater area. (TR. at 75). Ms. Echevarria explained that she had worked with other clients in the Elizabeth City area. (TR. at 76). Ms. Echevarria noted that she was aware of several jobs listed in the newspapers that would likely accommodate sedentary positions.[9] (TR. at 76).

Ms. Echevarria testified that, in her professional opinion, Claimant could reasonably compete for the jobs listed in the labor market survey, given his education and his limitations. (TR. at 79). Ms Echevarria elaborated, "The jobs that I identified all request a high school diploma and prefer some additional college." (TR. at 79). Ms. Echevarria noted that in her

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about "the education, physical requirements, but did not specifically refer to [Claimant's] entire profile." (TR. at 90).

[8] Ms. Echevarria explained that the transferable skills included "the ability to use arithmetic, the ability to use blueprint sketches or drawings, to measure precisely, and to understand simple instructions to perform the same task repeatedly." (TR. at 87.) Ms. Echevarria conceded that she never tested Claimant's math skills. (TR. at 88).

[9] This testimony was accepted for the purpose of showing that, based on Ms. Echevarria's direct knowledge, jobs were available in the Elizabeth City area. This testimony was not accepted for the purpose of showing that these positions in the newspaper are suitable alternate employment for Claimant. (TR. at 77).

experience, cold calling is not an effective means of securing a job. Rather, Ms. Echevarria opined that one has a better chance of getting a job if he or she applies to places that actually have openings advertised. (TR. at 80).

Ms. Echevarria testified that the body of the labor market survey contains her opinion as to the wage earning capacity of Claimant at various levels. (TR. at 80). Ms. Echevarria was asked to explain what the $474 per week listing on the labor market survey indicates, to which she replied:

> The entry level position at Geico pays slightly higher than some of the other positions in the area. So at $11.58 per hour it would be approximately $474.40 [per week in a forty hour work week].

(TR. at 81). Ms. Echevarria noted that this is the highest paying job she felt was available to Claimant. The $327 per week figure listed on the labor market survey indicates the average of all the positions she felt was available to Claimant based on a forty-hour work week.[10] (TR. at 81).

Ms. Echevarria was asked on cross to detail the Geico position. Ms. Echevarria responded that a customer service agent for Geico Direct would "receive incoming calls, they type the client's information into the computer, the information that comes up on a screen, and they answer questions based on that screen." (TR. at 90). Ms. Echevarria also agreed that several of the positions listed on the labor market survey require a candidate who can communicate well over the phone. (TR. at 91). Ms. Echevarria conceded that the likelihood of obtaining such position would depend "to some extent on [Claimant's] personality and demeanor." (TR. at 92). Ms. Echevarria noted that she never spoke with Claimant in person or on the telephone. (TR. at 93).

Labor Market Survey

A labor market survey regarding Claimant was completed on June 19, 2003, and updated on December 1, 2004. (EX 8-1). The following resources were used in completing the report:

- Information obtained from the initial interview with [Claimant]
- Medical information provided by William Jiranek, M.D.
- Department of Labor's Dictionary of Occupational Titles, Revised Fourth Edition
- Guide for Occupational Exploration
- Occupational Outlook Handbook, 2001 Edition
- OASYS Software Program
- Statistical information obtained from the Virginia Employment Commission

[10] Ms. Echevarria acknowledged that the Lillian Vernon position listed on the labor market survey was for only 6.5 hour shifts, and factored this in reaching the average salary. (TR. at 89).

(EX 8-3).

Specifically, the report noted that Claimant was under the following medical restrictions imposed by Dr. Jiranek, and had been since December 13, 2002:

- Work in sedentary position
- Standing and walking for less than ½ hour per eight hour day
- No returning to previous employment

(EX 8-3). The report further assessed Claimant's level of educational development, based on his work experience. It made note of Claimant's documented education and training history, including his two years of college and his previous work experience. (EX 8-4). The report identified Claimant's transferable skills using the OASYS software program in an effort to determine if Claimant would be suitable for other occupations and positions. (EX 8-5).

The labor market survey identified that following jobs and positions, given Claimant's work history, transferable skills, education and reported physical capabilities:

1. Customer Service Representative

It is believed that [Claimant] should find employment in the Customer Service Representative field, based on his ability to perform a variety of duties, and make judgments and decisions.

These workers investigate and resolve customer inquires concerning merchandise, service, billing or credit rating. They examine pertinent information to determine the accuracy of customers' complaints and responsibility for errors. They notify customers and appropriate personnel of findings, adjustments and recommendations (such as exchange of merchandise, refund of money, and credit to customers' accounts or adjustments to customers' bills).

The average wage for this occupation in Virginia in 1998 was $10.94 per hour. This would be equivalent to $1,896 per month or $22,755 per year, assuming a 40-hour week worked the year around. The estimated number of Adjustment Clerks-Merchandise & Billing employed in Virginia in 1998 was 14,105. It is projected that in 2008 there will be 21.003. This represents a growth rate of 48.9% over this period, faster than the 22.6% growth rate for all occupations in Virginia. Growth plus replacement needs are estimated to average about 782 openings per year. This does not, however, take into account how many workers will be competing for these openings.

Jobs Identified

Employer:	Geico Direct Virginia Beach, Virginia
Position:	Customer Service Agent[11]
Salary:	$24,664.00
Hours:	38.75 hours per week
Availability:	Have been hiring full time
Update:	Positions are open, and salary has increased to $25,404.00 per year.

Employer:	Household Credit Chesapeake, Virginia
Position:	Credit Card Sales and Services[12]
Salary:	$10.00 and up
Hours:	40 hours per week
Availability:	Currently hiring
Update:	Positions are currently available for both Chesapeake and Virginia Beach.

Employer:	Bank of America Norfolk, Virginia
Position:	Customer Service Representative[13]

[11] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position entails the following duties:

- Customer service via telephone
- CSR must be at a desk, answering telephone
- Types information into a computer

Requirements:

- HS diploma/GED
- Must be 18 years old.

(EX 4-14).

[12] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position entails the following duties:

- Receive inbound phone calls from credit card customers with Household credit cards
- Assist customers with credit card inquiries regarding payments or billing status
- Complete transaction balances and insurance on credit cards
- Complete training provided – Windows program
- No typing speed required
- Must be well-spoken and courteous to customers
- May use copier or fax when needed
- Morning, day and evening shifts (must be flexible)

(EX 4-15).

[13] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position entails the following duties:

- Answers inbound telephone inquiries regarding account information from Bank of America customers
- May open account via the use of a computer to obtain specific information regarding the status of an account

Salary:	$9.15 – 10.52/hour
Hours:	part to full time
Availability:	Hiring for training that starts in July
Update:	Currently hiring at 9.15 – 10.25/hour

Employer:	GC Services Chesapeake, Virginia
Position:	Operator[14]
Salary:	$7.00/hour and up to $9.00 after 6 months
Hours:	40 hours per week
Availability:	Currently hiring, next class is pending
Update:	Currently this company has closed

Employer:	AAA of Tidewater Virginia Beach, Virginia
Position:	Service Representative[15]
Salary:	$7.00/hour
Hours:	40 per week
Availability:	Currently hiring
Update:	Currently hiring at $8.50/hour

- May provide information regarding last statement, payment due, or address information
- Training is provided by employer
- Excellent benefits

(EX 4-11).

[14] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position entails the following duties:

- Responsible for answering inbound calls from customers requesting directory assistance (411)
- Will use a computer to access information
- Will provide directory information to a customer
- Basic understanding of a computer
- May alternate sitting and standing
- Does not require a HS/GED Diploma
- Must be flexible
- Employer will train
- Must type 10 to 30 words per minute

(EX 4-12).

[15] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position entails the following duties:

- No previous experience required, but preferred
- On the job training provided by employer
- Will answer the telephone, take down information from customer, and direct calls
- Basic understanding of computer
- May alternate sitting and standing.

(EX 4-10).

2. Order Takers:

It is believed that [Claimant] could obtain employment as an Order Taker, based upon his ability to obtain precise limits and make judgments and decisions. The positions identified are considered to be entry level with on the job training provided.

These workers fill customers' mail and telephone orders from stored merchandise according to specifications on sales slips or order forms. Their duties are mainly clerical and include computing prices of items, completing order receipts, keeping records of outgoing orders, and requisitioning additional materials, supplies and equipment.

The average wage for this occupation in Virginia in 1998 was $8.73 per hour. This would be equivalent to $1,513 per month or $18,158 per year, assuming a 40-hour week worked the year around. The estimated number of Order Fillers-Wholesale & Retail Sales employed in Virginia in 1998 was 4,127. It is projected that in 2008 there will be 5,092. This represents a growth rate of 23.4% over this period, faster than the 22.6% growth rate for all occupations in Virginia. Growth plus replacement needs are estimated to average about 196 openings per year.

Jobs Identified:

Employer:	AAA[16]
	Virginia Beach, Virginia
Position:	Auto Travel Counselor
Salary:	$7.00 to start
Hours:	40 hours per week
Availability:	Hiring for offices in the Southside of Virginia
Update:	Position has been filled within the last month at $8.00/hour.
Employer:	Lillian Vernon
	Virginia Beach, Virginia
Position:	Order Taker[17]

[16] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position entails the following duties:

- Requires knowledge of geography, ability to read maps
- Maps out routes – creates "trip tic"
- On the job training provided by employer
- Will answer the telephone, take down information from customer, and direct calls
- Basic understanding of computer
- May alternate sitting and standing
- Makes hotel/car rental, and condo reservations
- Sells AMEX travelers checks, attraction tickets and packages.

(EX 4-9).

[17] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this position

Salary:	$6.40 – 6.90 per hour
Hours:	30+ hours per week
Availability:	Accepting applications for August training
Update:	Positions have been filled within the last two weeks
Employer:	ICT Group Virginia Beach, Virginia
Position:	Call Center Attendant[18]
Salary:	$7.00 per hour
Hours:	27+ hours per week
Availability:	Accepting applications for the evening shift
Update:	Currently hiring at $7.50/hour plus commissions

(EX 8). The labor market survey further noted that these job descriptions were sent to Claimant's treating physician, and were all approved on June 26, 2003. (EX 8-8; EX 8-17, 18, 19).

Testimony of Burton Howard Lynn

Mr. Lynn is employed by Abercrombie, Simmons and Gillette as a case manager for Employer. In this position, Mr. Lynn handles workers' compensation claims. (TR. at 95). Mr. Lynn noted that Claimant was one of his clients. (TR. at 95).

Mr. Lynn recalled that Claimant had been working for Outsource Resources in July of 2002. (TR. at 95). Mr. Lynn testified that he had never had a conversation with Claimant or with a supervisor of Outsource Resources about not permitting Claimant to work there. (TR. at

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entails the following duties:

- Responds to inbound calls
- Complete customer order by entering information into computer
- Remain updated regarding new products
- Provide feedback to supervisor
- Shifts are 6.5 hours, additional hours available upon request
- Will remain at terminal for full shifts
- Offer special and DVD's to customers
- Lift up to 25 lbs.

(EX 4-13).

[18] Additional job duties included in the regular job duty analysis sent to Dr. Jiranek indicated that this positions entails the following duties:

- Contact customers to review and confirm services performed
- Read product information to customer
- Enter data obtained from customer into computer
- No previous computer experience required, will provide training with computer
- Will work while sitting or standing at station as needed
- No educational or experience pre-requisites

(EX 4-16).

95). Mr. Lynn testified that work was available for Claimant during that month at the same rate of pay he had received periodically throughout. (TR. at 95).

Mr. Lynn opined that Claimant took himself out of work with Outsource Resources. (TR. at 96). Mr. Lynn explained that "there's nothing that kept [Claimant] out of work during that period." (TR. at 96). Mr. Lynn explained that although Employer ceased referring its workers to Outsource Resources in 2003 or 2004, this practice occurred through 2002. (TR. at 96).

Testimony of Dr. William Jiranek, M.D.

Dr. Jiranek is a board certified orthopedic surgeon. (EX 16-2). Dr. Jiranek initially examined Claimant on January 17, 2002, upon referral from Dr. Arthur Wardel. (EX 16-3). Dr. Jiranek noted that Claimant previously had an MRI performed on his hip that revealed a labial tear. (EX 16-3). Dr. Jiranek explained that he initially tried a conservative treatment of cortisone shots and physical therapy. This treatment made Claimant "forty percent better by his admission." (EX 16-4). Dr. Jiranek concluded that Claimant's hip was causing some of his pain, and thus recommended that Claimant undergo a hip arthroscopy. (EX 16-4).

Dr. Jiranek's notes dated August 7, 2002, indicated that Claimant appeared to have "exaggerated pain response." (EX 4-16). Dr. Jiranek offered clarification:

> This means [Claimant] appeared to have a lot more pain than most people with an isolated labial tear. An exaggerated gate, exaggerated pain with any motions of examining him. So what that means is it is again, another part of the possible where I am not sure that all of this is due to the labial tear demonstrated by the MRI.

(EX 16-5).

Claimant underwent surgery on his right hip on October 15, 2002. (EX 16-5). Dr. Jiranek described the procedure as a "right hip arthroscopy, with a resection of posterior labial tear and debridement of anterior labial tear." (EX. 16-5).

Claimant's first post-surgery examination occurred on October 24, 2002. During this visit, Dr. Jiranek noted that he wanted Claimant to start weaning off his two crutches in order to increase his weight bearing. (EX 16-6). Dr. Jiranek kept Claimant totally out of work following this visit. (EX 16-6).

Dr. Jiranek once again evaluated Claimant on December 13, 2002. (EX 16-6). Dr. Jiranek noted that Claimant was making steady progress, and released him with sedentary restrictions. (EX 16-7). Dr. Jiranek spoke to Claimant via telephone on January 8, 2003, at which time they reviewed the restrictions, and Claimant was informed that "he did not need two crutches for ambulation." (EX 16-7).

Dr. Jiranek's next examination of Claimant occurred on February 26, 2003. (EX 16-8). Claimant indicated that he had been working eight hours a day, "but was complaining considerably about his hip and he said that he couldn't sit and needed to lie down." (EX 16-8). Dr. Jiranek testified that a physical exam revealed:

> [Claimant] had some restrictions of flexion, which appeared to me to be due to active resistance. In other words, he was fighting the attempt to flex him. He did not have positive provocative tests. By that I mean tests which would irritate somebody with labial pathology, that is, the negative labial maneuver and negative straight leg raise. He didn't have any signs or symptoms suggestive of a lumbar ideology, no sciatic notch tenderness, straight leg raise was negative, neurological exam was normal. So, I couldn't find anything on his physical exam that corroborated his severe complaints of pain.

(EX 16-8, 9). Dr. Jiranek informed Claimant he needed to continue working full time and further stated that "I didn't think there was much at this point that could be done additionally to his hip to help his symptoms." (EX 16-9).

Dr. Jiranek ordered a functional capacity evaluation giving Claimant permanent restrictions on May 5, 2003. (EX 16-10). Dr. Jiranek testified that the results of the evaluation "demonstrated substantial amount of inconsistency consistent with symptom magnification." (EX 16-10).

Dr. Jiranek noted that Claimant was still using two crutches on May 23, 2003. (EX 16-11). However, Dr. Jiranek observed that:

> [W]hen I looked at his shoe he had evidence of considerable wear of the sole of the right shoe, both the heel and the sole – forefront of the shoe. He had full range of motion of the hip, and again, negative provocative maneuvers. In other words, the maneuvers we usually do to cause – that induce pain in people with labial pathology and other hip pathology did not cause him pain in my exam.

(EX 16-11). Dr. Jiranek conceded that he had no way of knowing how old Claimant's shoes were at the time of the examination. (EX 16-18).

Dr. Jiranek testified that he felt Claimant was not being compliant during the exam, and that Claimant was not displaying symptoms consistent with his right hip injury and subsequent surgery. (EX 16-11). Dr. Jiranek continued Claimant on his restrictions following this May 23, 2003 examination, specifically that he could "lift 25 pounds or less, should not walk for more than 15 minutes, but that he should be able to tolerate a sedentary job." (EX 16-12). Dr. Jiranek further opined that Claimant did not need his crutches following this date. (EX 16-12). Dr. Jiranek opined that Claimant reached Maximum Medical Improvement on May 23, 2003. (EX 16-13). Dr. Jiranek noted that he requested Claimant return in one year for a final check. However, as of March 18, 2005, Dr. Jiranek had not seen Claimant since May 23, 2003. (EX 16-13).

Dr. Jiranek testified that he was asked to consider a number of job descriptions and offer an opinion of whether each was appropriate for Claimant, given his restrictions. (EX 16-13). These job descriptions contained details concerning the physical activities each required in an eight hour period. Specifically, the auto travel counselor position for AAA generally requires approximately one hour of reaching above shoulder height, .5 hour of standing, and 8 hours of sitting. (EX 4-9). The Service Representative position for AAA required eight hours of sitting, as did the Customer Service Representative position for the Bank of America and the Directory Assistant Operator position with GC Services. (EX 4-10, 11). Additionally, the Lillian Vernon Order Taker position required six hours of sitting, as this position only required six hour shifts. (EX 4-13). The Customer Service Operator position for Geico Direct generally requires approximately one hour of reaching above shoulder height, and eight hours of sitting. (EX 4-14). The Customer Service Representative position with Household Credit Services requires eight hours of sitting. (EX 4-15). Finally, ICT Group's Call Center Attendant position requires seven hours of sitting. (EX 4-16). Dr. Jiranek approved each of these positions as being appropriate and within Claimant's physical restrictions. (EX 4-10 through 16).

Analysis

Temporary Total Disability for the period of July 10, 2002 through August 14, 2002

To establish that he is totally disabled, Claimant must demonstrate that because of the effects of his work-related injury he has no residual wage-earning capacity. Initially, Claimant must make a *prima facie* showing that he cannot return to his pre-injury employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997). Should Claimant make this showing, the burden shifts to Employer to rebut the finding of disability by establishing that suitable alternate employment exists which Claimant is capable of performing. *See Brooks v. Director, Office of Workers' Compensation Programs*, 2 F.3d 64, 65 (4th Cir. 1993) (per curiam). If Employer establishes that suitable alternate employment exists, Claimant may nevertheless demonstrate that he is totally disabled if he proves that he reasonably and diligently sought employment but was unable to secure a job. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

In the present case, the parties have stipulated that Claimant is unable to return to his pre-injury employment. (JX 1). Thus, the burden shifts to Employer to establish that suitable alternate employment existed during this contested period.

Claimant asserts that he is entitled to temporary total disability benefits for the period of July 10, 2002 through August 14, 2002. At the hearing, Claimant confirmed that he returned to post-injury work with a company called Outsource Resource, Inc. (TR. at 17). Claimant testified that he continued to receive temporary partial disability benefits during that period of time.[19] Claimant testified that his employment with Outsource Resources, Inc. ceased after his supervisor indicated that he should not continue to come to work. (TR. at 17). At the same time,

[19] Employer's LS-208 verifies that temporary partial benefits were paid from March 17, 2002 through June 20, 2002 at the rate of $114.21 per week based on that work. (EX 11).

Claimant's disability also ceased, and he was only picked up again on temporary total disability benefits effective August 15, 2002. (EX 11).

Where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). The claimant does not have the burden of showing that no conceivable suitable alternate employment is available; rather, the employer must prove that suitable alternate employment exists. *Shell v. Teledyne Movible Offshore*, 14 BRBS 585 (1981); *Smith v. Terminal Stevedores*, 11 BRBS 635 (1979). Though not explicit, Employer appears to argue through the testimony of Mr. Lynn that the Outsource Resources position constituted suitable alternate employment for this contested period. Specifically, Mr. Lynn testified that he had never informed a supervisor of Outsource Resources that Claimant was no longer permitted to work with the company. (TR. at 95). Mr. Lynn testified that work remained available in Outsource Resources for Claimant during the month following his termination at the same rate of pay he had received periodically throughout. (TR. at 95). Mr. Lynn opined that Claimant took himself out of work with Outsource Resources. (TR. at 96).

The fact that the claimant had a short-term job post-injury does not establish that he is not now totally disabled, unless the employer shows that it is currently available. *See Carter v. General Elevator Co*., 14 BRBS 90, 97 (1981); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 734, 740 (1978). The only evidence Employer offers that this position remained available to Claimant is the testimony of Mr. Lynn, who had no involvement in removing Claimant from this employment. (TR. at 95). However, Claimant directly counters this assertion, by testifying under oath that an Outsource Resources supervisor specifically told him not to return to work. (TR. at 17). Unfortunately for Employer, the testimony of this supervisor, and any records supporting Mr. Lynn's testimony that Claimant removed himself, are notably absent from the record. Mr. Lynn's testimony alone that this work remained available during the contested period fails to carry Employer's burden of establishing that this position remained readily available and constituted suitable alternate employment. Employer has additionally failed to offer evidence that this position remained a realistic job opportunity that Claimant was capable of performing, considering his age, education, work experience, and physical restrictions.

Further, there is no evidence in the record that the positions listed in the labor market survey were available during this contested period. The initial labor market survey was completed on June 19, 2003, and all positions were listed as "currently available", but it made no mention of whether these positions had been open in 2002.

Therefore, I find that Employer has failed to establish the existence of suitable alternate employment for this contested period. As such, Claimant is entitled to temporary total disability benefits for the period of July 10, 2002 through August 14, 2002.

Temporary Partial Disability for the period of January 28, 2003 through April 9, 2003

Section 8(e) of the LHWCA provides:

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 8(e).

Claimant credibly testified that, after his surgery and subsequent release to sedentary duty work, he was placed in a position through vocational services with a company called Randstad. (TR. at 20). Randstad's employment records confirm that Claimant was employed from January 28, 2003 until April 9, 2003, and that he earned an hourly rate of $6.05 an hour. Claimant asserts that Randstad's records verify that Claimant earned $1,710.65 in gross wages through his work during the above-referenced period, a period of 10.29 weeks. (EX 14-5). Though there is evidence in the record that this position was intended to be for forty hours a week, Claimant's wage records from Randstad confirm that he never actually worked forty hours in a given week. (EX 8-38; 13). The record is absent an explanation of this discrepancy. Claimant argues that dividing the gross wages by the number of weeks in question reveals a weekly average of $166.24. Claimant purports that subtracting that from the pre-injury average weekly wage of $240.21 (JX 1) reveals a weekly loss of $73.97, and a corresponding compensation rate of $49.31. Employer has offered no evidence to dispute that this is Claimant's residual wage earning capacity during this contested period.

Upon consideration of the evidence, I find that the wages earned by Claimant at Randstad reasonably and fairly represent his wage-earning capacity pursuant to § 8(h) of the Act. This amount is the appropriate amount in determining Claimant's wage-earning capacity, as it reflects the wages that Claimant actually received. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 406 (1989). Given this evidence, Claimant is entitled to temporary partial disability compensation from January 28, 2003 through April 9, 2003 at a rate of $49.31 ($240.21-$166.24 × 2/3 = $49.31) per week.

Temporary Total Disability for the period of April 10, 2003 to the present and continuing

Claimant argues that he is entitled to temporary total disability benefits upon termination of his employment with Randstad. To reiterate, the parties have stipulated that Claimant is unable to return to his pre-injury employment with Employer. (JX 1). Thus, the burden shifts to Employer to demonstrate that the claimant retains the capacity to earn wages in a regular job by showing the availability of suitable alternative employment which the claimant is capable of performing during this contested period. *See, e.g. Tann*, 841 F.2d at 542.

Employer argues that the Randstad position continued to constitute suitable alternate employment following April 9, 2003. Employer argues that this position is within Claimant's educational, vocational, physical and skill levels. Employer asserts that the record reflects that Claimant removed himself from this suitable alternate employment when he asked to be released and refused to be considered for other positions within Randstad. Thus Employer argues that the Randstad position remains suitable alternate employment following Claimant's termination, and that he voluntarily left this position for reasons unrelated to pain or physical inability to perform the light duty work.

Contrary to Employer's argument, I find that the Randstad position does not constitute suitable alternate employment during this contested period of time. There is sufficient evidence in the record that Claimant was unable to meet the productivity demands of the job, required too many breaks due to his injury, felt ongoing pain in the position, and fell on the job on at least one occasion as a result of his injury-related pain. (TR. at 25).

Additionally, the subsequent toll collector position offered by Randstad to Claimant does not constitute suitable alternate employment. The only evidence of the physical requirements of this position is found in Claimant's testimony, which noted that this position required a lot of standing. (TR. at 57). As this appears to exceed Claimant's restrictions of standing only .5 hour per 8 hour work day, this position is not suitable alternate employment.

Labor Market Survey

However, Employer sufficiently identified the availability of several suitable alternate positions for Claimant via vocational testimony and the labor market survey. When referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exist." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). The employer cannot satisfy its burden of showing suitable alternate employment by identifying only one job opening, as "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id*. It is also well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job opportunities to be realistic, Employer must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). While the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs may be relied upon, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), Employer's counsel must identify specific, available jobs; labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981).

Employer has provided a thorough and comprehensive labor market survey prepared by a well-qualified vocational rehabilitation specialist. This document details a range of jobs that appear readily available and fall within Claimant's restrictions and capabilities. The labor market survey further outlines precise nature and terms and the pay scales for the alternate jobs. The labor market survey completed by Ms. Echevarria shows a range of seven jobs that were

available to Claimant during this critical period.[20] For each listed position, the labor market survey supplies the title of the position, a specific description of the duties required by the job, the hours and rate of pay, qualifications, availability, and physical requirements. Additionally, each position was approved of by Claimant's treating physician. (EX 8).

In summary, I find that Employer has met its burden of proving that the following seven positions constitute suitable alternate employment: (1) Customer Service Representative at Geico Direct (2) Credit Card Salesperson at Household Credit; (3) Customer Service Representative at Bank of America; (4) Service Representative for AAA of Tidewater; (5) Auto Traveler Counselor for AAA; (6) Order Taker at Lillian Vernon; and (7) Call Center Attendant at ICT Group. The Operator position for GC Services does not constitute suitable alternate employment because, according to the updated labor market survey, this company had since closed, thus rendering this position not readily available.

I find that the other listed jobs represent a range of available jobs for which Claimant could realistically compete. Thus as Employer has shown the availability of suitable alternate employment within Claimant's restrictions, the burden now is on Claimant to show that he is ready, willing and able to return to work, just like any other unemployed worker. *See Palombo v. Director, OWCP,* 937 F.2d 70 (2d Cir. 1991).

Diligent Job Search

Claimant can rebut Employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *New Orleans (Gulfwide) Stevedores v. Turner* , 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). *See also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991) (Second Circuit added in this step to the *Salzano* burden-shifting scheme); *Trans-State Dredging v. Benefits Review Bd. (Tarney),* 731 F.2d 199, 201-02, 16 BRBS 74, 76 (CRT) (4th Cir. 1984), *rev'g* 13 BRBS 53 (1980); *Royce v. Elrich Constr. Co.,* 17 BRBS 157, 159 n.2 (1985).

Claimant argues that his active job search was both reasonable and diligent. Because his job search has proved unsuccessful, Claimant asserts that he has rebutted Employer's evidence of suitable alternate employment and therefore is totally disabled. Claimant's evidence consists of his voluminous job search report detailing his search from late 2003 until early 2005. (EX 2). Additionally, a number of Claimant's job search contacts were confirmed through the application copies. (EX 2). Claimant also obtained written verification of employment contacts from a number of potential employers. (EX 2). Claimant testified that he focused his job search on

[20] Though the labor market survey was completed in June of 2003, Ms. Echevarria testified that she asks potential employers about job availability for the previous two to three months. (TR. at 75). Thus, this labor market survey provides sufficient evidence of suitable alternate employment for this entire contested period.

obtaining a sedentary type position, and contacted a number of doctor's offices, dentists' offices and attorney's offices, as he felt that those were the type of places that would offer sedentary work. Additionally, Claimant asserts that he contacted the various employers identified by Ms. Echevarria in her labor market survey. (EX 2). Claimant noted that he submitted either a written or on-line application to these various employers, but was never granted an interview or offered a position. (TR. 31-4).

Despite the voluminous paperwork Claimant has submitted into the record purportedly detailing an intense job search, I find that, in reality, he has failed to make a diligent job search. The majority of the businesses Claimant contacted seeking work were not advertising available employment positions, and many required educational experience or skills that he did not possess. Claimant appears to have very little administrative experience that would render him a qualified candidate in this capacity for the various doctors', dentists', and attorneys' offices he called.

Additionally, much of his contact was made via a "cold call," in which Claimant would call various offices out of the yellow pages and ask the person who answered whether they were hiring. There is no evidence in the record that Claimant ever referenced a newspaper "want ad" section to investigate job openings.

There is also evidence which suggests that Claimant exaggerated his restrictions when he actually spoke with potential employers. Specifically, there is evidence in the record that Claimant went to at least one interview with Mr. Lynn in early 2003 on crutches, which his treating physician specifically testified were not medically necessary. (EX 16-7; EX 4-42). Claimant also appears to have misrepresented his education by failing to note that he has two years of college, and demanded limited work hours by refusing to work weekends or mornings. (CX 2).

Further, Claimant's submission of applications for positions listed on the labor market survey does not in and of itself constitute a diligent job search. Failure to follow up with prospective employers after dropping off a paper application or submitting an online application could be viewed as a way of padding a job search log without actually trying to find employment. There is no evidence in the record that Claimant followed up on the applications he submitted to the prospective employers listed on the labor market survey.

As for the other employers Claimant contacted and listed in his job search log, Claimant's efforts must go beyond a general inquiry into whether a business is hiring. Claimant should have sought out prospective employers who are actually hiring, determine whether those employers offer work that is within the claimant's restrictions, and then pursue those positions which come available. Because I find that Claimant did not conduct a reasonable and diligent job search, his claim for total disability from April 6, 2000 to the present and continuing must be denied.

As discussed above, Ms. Echevarria testified the average weekly wage of the suitable alternate positions was the $327 per week figure listed on the labor market survey, and indicates the average of all the positions she felt was available to Claimant based on a forty-hour work

week.[21] (TR. at 81). Because this exceeds Claimant's pre-injury average weekly wage of $240.21, I find that Claimant has not suffered a loss of wage-earning capacity, and is thereby not entitled to temporary partial disability benefits for the period of April 10 through the present and continuing.[22]

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Virginia International Terminals, is hereby ordered to pay to Claimant, Ronald Wilson, Jr., temporary total disability benefits for the period of July 10, 2002 through August 14, 2002 inclusive, at the compensation rate of $233.46 per week;

2. Employer, International Virginia International Terminals, is hereby ordered to pay to Claimant, Ronald Wilson, Jr., temporary partial disability benefits for the period of January 28, 2003 through April 9, 2003, inclusive, at the compensation rate of $49.31 per week;

3. Claimant's claim for temporary total disability benefits for the period of April 10, 2003 through the present and continuing is hereby denied;

4. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5. Employer shall receive credit for any compensation already paid;

6. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

[21] The exclusion of operator position in GC Services would not adversely affect this average. This position was listed in the labor market survey for $7.00 an hour, rendering a weekly rate of $280, which is less than the average of all positions together.

[22] Had Claimant been entitled to benefits for the period of April 10, 2003 though the present and continuing, discussion into the nature of the benefits would have been necessary. Even though there is evidence in the record that Dr. Jiranek deemed Claimant as reaching MMI on May 23, 2003, Claimant sought only temporary benefits. However, as Claimant is not entitled to benefits, discussion of this issue is moot.

7. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge